United States Court of Appeals

FOR THE FOURTH CIRCUIT

JAMES H. FRIEND, SILAS TROWELL and FLOYD LONG,
Appellants,

versus

TROPIS COMPANY, LTD.,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK
JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued June 23, 1967. Decided September 11, 1967.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

Sidney H. Kelsey (Kelsey & Rabinowitz on brief) for Appellants and John W. Winston (Seawell, McCoy, Winston & Dalton on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

For personal injuries suffered by them while working in the hold of the Greek freighter, SS AVRA, discharging cargo at Norfolk, Virginia, longshoremen Trowell, Friend and Long brought this action at law for damages against her owner, Tropis Company, Ltd. On

both assertions of liability—negligence and unseaworthiness of the vessel—the jury found for the defendant. From the judgment of the District Court entered on this verdict, the plaintiffs appeal: (1) for the refusal of the Court to direct a finding of liability for unseaworthiness, and (2) for misdirection upon this alleged liability. The motion was correctly overruled, and we conclude, too, there was no reversible error in the instruction.

The injuries, concededly, resulted from electric shocks suffered while these men were trimming a cargo of bulk potash for unloading. "Grabs"—clam shell buckets on a hoist—were let down into the hold through the hatchway for removal of the lading. As they "grabbed" it, the longshoremen would fill the hole dug by the grabs so that they could pick up a full load on return. The potash ran like sand, and the workers slid with it towards the excavation. To stay their slide they would reach for a stanchion or beam. On the occasion in suit, just as they were about to touch a metal piece of this kind, the longshoremen felt an electric shock and were hurt.

As electricity indubitably was the cause of their injuries, the next question was its source. Plaintiffs blamed it on defective wiring. In denial, the defendant ascribed it to static electricity generated on the bodies and clothes of the claimants by friction with the potash. That such activity could create a charge was demonstrated in producing an electric arc by holding a metal shovel scoop a fraction from an inch from the stanchion or beam just after passing it through the potash. No further arcing could be obtained until the shovel again had been put in abrasive contact with the potash and held near the metal strut. A small shock was felt when one walking over the cargo touched the steel ladder leading to the

deck above. Expert testimony declared this phenomenon accountable for the electricity in the hold. At the same time, qualified witnesses gave evidence to the safety and good order of the electric system aboard ship.

The accident occurred in Number 2 hold about 2 o'clock in the afternoon of November 1, 1963. Having worked the hold continuously since 8 o'clock that morning without mishap, plaintiffs turned to again at 1 p.m. after a lunch break. An hour later they sustained the shocks. Work in that hold was immediately suspended, with off-loading of similar cargo shifted to another hold without event or mishap. In the morning the temperature at 8 o'clock had been 55 degrees and the relative humidity 57 per cent. From then on the temperature increased and the humidity declined until 2 p.m. the Weather Bureau reading showed 71 degrees and 36 per cent.

It was authentically testified that relative humidity within the range of 30 to 40 per cent will foster the accumulation of electric charges. Damp air, it is said, harmlessly conducts the charge off to ground it as it is formed; dry air is an insulator, favoring the accretion of substantial charges. No such static electricity, according to the testimony, had ever been encountered in a ship's hold at or near Norfolk in the memory of watermen witnesses, a retrospect of some 25 years. Furthermore, we are told without contradiction that no practical means to prevent the creation of static in the circumstances is known.

Notwithstanding, the plaintiffs urge, electricity free in the hold rendered the ship unseaworthy, denying the longshoremen a safe place in which to work as assured by the doctrine of unseaworthiness. Their argument is that the cause of the presence of this injurious element is

immaterial—that the defendant is responsible for the electricity in the hold whether it escaped through defective wiring or was generated from the men's friction with the cargo. On this reasoning the plaintiffs moved for a peremptory instruction to the jury to find unseaworthiness. Refusing the requested direction, the Court charged that the defendant was liable if the electricity came from defective wiring, but that there was no responsibility "if the shock was caused solely by static electricity."

Denial of the motion was altogether proper; it would have foreclosed the ship's defense on the issue of responsibility for the static electricity. The instruction, true, evinced the idea that static electricity does not in law render a vessel unseaworthy; this could possibly be too broad an immunization of the ship. However, the Court may have intended merely to withdraw the issue from the jury for inadequate evidence. In any event, we think it should have been taken away for the latter reason, and the withdrawal for any other reason was not hurtful to the plaintiffs.

Proof that electricity was at large in the hold established unseaworthiness prima facia and, without more, warranted the jury to make that finding. But the defendant was entitled to contest the plaintiffs' showing, as it did. Thereafter the issue became a question to be resolved by the jury on the evidence and under instructions defining unseaworthiness. According as the jury found there was or was not a wiring defect releasing the electricity, of course liability would or would not be imputable to the defendant on that score. But static electricity could not be excluded as nonactionable as a matter of law. The jury would have been allowed to speak on liability

based upon static electricity if there had been evidence enough to allow it to ponder the question.

As the present verdict was for the defendant, the jury obviously found no casual defect in the electric system. While the court's charge was phrased as an unqualified holding that static electricity could not be a predicate of recovery, it was also, in effect, a declaration to the jury that the evidence would not justify a verdict on that basis. Therefore, we are not required to say whether static electricity on a ship does or does not constitute unseaworthiness. Hence we turn at once to evaluate the proof instantly offered to establish an unseaworthiness resulting from static electricity.

To begin with, the plaintiffs adduced no evidence whatsoever to prove the loose electricity the product of a static charge. Indeed, the argument of the plaintiffs in the trial court, as well as on appeal, blamed a defect in the ship's wiring for introduction of electricity in the hold. Static electricity came into the case through the defendant's explanation of the entry of this foreign factor. However, the plaintiffs were not precluded from relying on this evidence, and we thus come to the inquiry whether this electricity breached the ship's warranty of seaworthiness to the longshoremen. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946).

The warranty, as pertinent here, was that the ship was reasonably fit to permit the plaintiffs to perform with reasonable safety the tasks assigned to them. Reasonable care to keep the ship in a reasonably fit condition is not enough, although it would require a charge of negligence. Seaworthiness demands reasonable safety unconditionally. But "the owner is (not) obligated to furnish an accident-

free ship . . . The standard is not perfection, but reasonable fitness . . . a vessel reasonably suitable for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550 (1960).

In measuring the present case by these standards, it is clear that the static electricity did not, on the proof, make the AVRA unseaworthy. The electric charge no more emanated from the ship, her gear or equipment than from the men themselves. The causative factor here was the entry into the hold of relatively drier air with its insulating properties. The potential for harm arose not because electricity was generated but because the air would not bleed if off to ground. This was a natural condition of the natural atmosphere. The happening of the injurious discharge, when the men touched a willing conductor, was no more controllable by the ship than was a stroke of lightning, and just as unforeseeable.

Apposite here are the decision and following words of the Court in *Morales* v. *City of Galveston*, 370 U. S. 165 (1962):

> "The trial court found, upon substantial evidence, that what happened was an unexpected, isolated occurrence . . . " (p. 169.)
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> "What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without . . . " (p. 171.)

There the claimants "were injured by fumes from the chemical, made noxious by concentration in the closely

confined area (the hold) where they were working" as trimmers of a cargo of grain. The owner was acquitted of the indictment of unseaworthiness. For like reasons we see no liability upon the owner in the case at bar.

Affirmed.

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EXCERPTS FROM THE DISTRICT COURT'S CHARGE, Approved by the Court of Appeals

(Tr. 185, 186, 187)

THE COURT:

Ladies and gentlemen, it now becomes my duty to charge you as to the law of the case after which it will be your duty to retire to your room, determine from the evidence the facts in the case, and apply to those facts the law as explained in this charge and render a true and just verdict.

At the outset let me restate to you very briefly the contentions of the parties, the issues in the case, because the law that I am going to explain to you a little later is concerned with these issues. It is not law in the abstract. It is law as it applies to this case.

The plaintiffs contend that they were shocked. There is no dispute about that. There is no evidence to the contrary. The plaintiffs were shocked. The plaintiffs contend that they were shocked by the electrical system of the ship. They point to the fact that the mate testified that at the time of the accident there were no cables jumped wih rubber jumpers, and they point to the fact that at the time the experts came five days later

that there was a jumper on the cables that ran through the number two hatch 'tween deck.

They contend it was the electrical system that caused the shock and that in thirty-four odd years of longshoremen or stevedoring there has never been known to have been a condition of static electricity causing shock unloading potash, and as a result of the shocks there the plaintiffs were injured.

Now, the defendants on the other hand, contend, or the defendant on its part contends that the shock was not caused by the electrical system. The defendant points to the very unusually low atmospheric relative humidity conditions that existed on the afternoon of November 1st, that static electricity was caused because the fertilizer was extremely dry, and that immediately after the men complained on the shock Johnson was able to demonstrate an arc when he pushed the shovel into the fertilizer and brought it near the stanchion and couldn't demonstrate the arc until he again pushed the shovel through the fertilizer.

Now, that is the defendant's contention and, of course, I have summarized them very briefly and in summarizing them I am not intimating in any way which contention is correct. That is for the jury to determine.

I am going to charge you about the law with respect to each contention. In the first place if the shock that the men received was caused in whole or in part by the wiring or the electrical system of the ship, the defendant is liable.

In the second place if the shock was caused solely by static electricity and was not caused by the wiring system of the ship, the defendants are not liable.

In the third place there is no contributory negligence on the part of the plaintiffs. They cannot be denied a recovery for anything that they did.

In the next place the plaintiffs did not assume the risk of being shocked while working in this hold so contributory negligence and assumption of risk are no defense.

Actually it boils down to a factual determination by this jury. If the jury believe from a preponderance of the evidence that the men were shocked by reason of the electrical system, then the defendant is liable. If you believe that static electricity caused this shocking episode, then the defendant is not liable.

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(Tr. 193, 194)

MR. KELSEY: (LONGSHOREMEN PETITIONERS' ATTORNEY)

My objections, if Your Honor please, are the Court should not have instructed the jury that if they find that the plaintiffs were injured by reason of static electricity then the defendant is not liable. And the reason for this is it is our position that if they were injured by electricity of any kind aboard the vessel that the vessel was unseaworthy as a matter of law since it was not originally intended to have its hold charged with electricity.

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(Tr. 194)

THE COURT:

Now, let the record show that at the conclusion of the entire case Mr. Kelsey moved for judgment for the plaintiffs on the ground that the ship was unseaworthy as a matter of law and the Court overruled that motion.

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SHIPOWNER'S EXPERT CHANDLER

(Tr. 127)

Q You say that static, these men were shocked by static electrical charges, is that correct?

A Yes, sir.

Q Which you say resembles lightning in some respects, I believe? I believe lightning is —

A Discharge of static —

Q Of course, lightning is dangerous, too, is it not?

A Yes, sir.

Q And discharge of static electricity can be dangerous, can it not?

A In an explosive atmosphere it is very dangerous.

Q Very dangerous.

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